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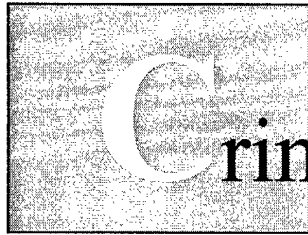
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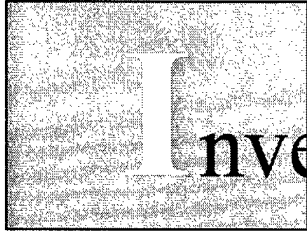
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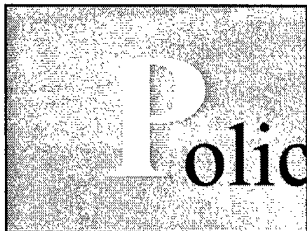
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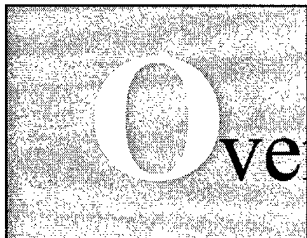
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Evaluation of
Sufficiency of Subpoena Authority within the Department of
Defense in Support of General Crimes Investigations

Report Number CIPO2001S004

May 15, 2001

Office of the Inspector General
Department of Defense

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Acronyms

AFOSI	Air Force Office of Special Investigations
CIPO	Criminal Investigative Policy and Oversight
IG	Inspector General
JA	Judge Advocate
JAGC	Judge Advocate General's Corps
JSC	Joint Service Committee
MCIO	Military Criminal Investigative Organization
MCM	Manual for Courts-Martial
NAPA	National Academy of Public Administration
NCIS	Naval Criminal Investigative Service
SJA	Staff Judge Advocate
UCMJ	Uniform Code of Military Justice
USACIDC	U.S. Army Criminal Investigation Command



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

May 15, 2001

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARY OF THE AIR FORCE
(FINANCIAL MANAGEMENT AND COMPTROLLER)
NAVAL INSPECTOR GENERAL
JUDGE ADVOCATES GENERAL OF THE MILITARY
DEPARTMENTS
STAFF JUDGE ADVOCATE TO THE COMMANDANT OF
THE MARINE CORPS
AUDITOR GENERAL, DEPARTMENT OF THE ARMY

SUBJECT: Evaluation Report on the Sufficiency of Subpoena Authority within the
Department of Defense in Support of General Crimes Investigations
(Report No. CIPO2001S004)

We are providing this report for your information and use. We considered management comments on a draft of this report when preparing the final report.

Comments on the draft of this report conformed to the requirements of DoD Directive 7650.3 and left no unresolved issues. Therefore, no additional comments are required.

We appreciate the courtesies extended to the evaluation staff. For additional information on this report, please contact Dr. Charles P. McDowell at (703) 604-8769 (DSN 664-8769) (cmcdowell@dodig.osd.mil) or Ms. Phyllis M. Brown at (703) 604-8810 (DSN 664-8810) (pmbrown@dodig.osd.mil). See Appendix B for the report distribution. The evaluation team members are listed inside the back cover.

A handwritten signature in black ink, appearing to read "Charles W. Beardall", is positioned above the printed name.

Charles W. Beardall
Deputy Assistant Inspector General
Criminal Investigative Policy and Oversight

Office of the Inspector General, DoD

Report No. CIPO2001S004

May 15, 2001

(Project No. 9950010J)

Sufficiency of Subpoena Authority within the Department of Defense in Support of General Crimes Investigations

Executive Summary

Introduction. This evaluation was performed to address two matters. First, a report by the National Academy of Public Administration noted that the Military Criminal Investigative Organizations (MCIOs)¹ lacked direct subpoena authority and recommended that DoD consider providing approval authority to the Services' General Counsels or another appropriate Service official. Second, an April 19, 1999, Air Force Office of Special Investigations memorandum to the Inspector General, Department of Defense (IG, DoD), recommended the establishment of subpoena authority for criminal investigations as an issue for the IG, DoD, Office of Criminal Investigative Policy and Oversight FY 2000 Project Plan.

Objectives. Our primary objective was to evaluate whether the limitations on the Services' authority to issue subpoenas adversely impacts their ability to conduct general crimes investigations.² The evaluation focused on the effectiveness of the authorities and mechanisms currently available to the MCIOs for obtaining documents or other evidentiary material during the course of their investigations. We also assessed whether the subpoena authority within the Office of the IG, DoD, adequately supports general crimes investigations conducted by the MCIOs.

Results. MCIO investigators lack fully effective mechanisms for compelling production of evidence in general crimes investigations. Results of a survey addressed to MCIO agents identified a significant number of situations in which a certain mechanism was needed but was not available. This condition exists because of the Services' limited authority to issue subpoenas and because the Inspector General does not normally issue

¹The MCIOs are the U.S. Army Criminal Investigation Command; the Air Force Office of Special Investigations; and the Naval Criminal Investigative Service, which services the Navy and the Marine Corps. The MCIOs are responsible for investigating most major crime in the Military Departments, including general crimes and fraud.

²For purposes of this evaluation, the term general crimes includes any felony type offense under the Uniform Code of Military Justice (UCMJ) punishable by a dishonorable discharge and 1 year confinement or greater. This definition does not include fraud or economic crimes, or purely military offenses (for example, desertion). Drug offenses are included in the general crimes category.

subpoenas in general crimes investigations unless the Department of Defense is the victim. The conclusion of the MCIO agents was further validated through a survey of the Services' judge advocates (JAs) with prosecution experience.

As a result of this lack of a fully effective mechanism to compel production of evidence, some investigations are incomplete and some prosecutions may be precluded. For details of the evaluation results, see the Finding section of this report.

Summary of Recommendation. We recommend that the General Counsel, Department of Defense, under the authority of DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamation, and Reports and Comments Thereon," May 21, 1964, initiate or direct action to establish additional subpoena authority within the military justice system as supported by this evaluation.

Management Comments. The DoD General Counsel, the Army, Navy, and Air Force concurred that Military Criminal Investigative Organizations lack effective mechanisms for compelling production of evidence in general crimes investigations. The Services also concurred in the recommendation to have the DoD General Counsel initiate or direct action to establish additional subpoena authority within the military justice system. The DoD General Counsel, the Air Force Judge Advocate, and the Navy Deputy Assistant Judge Advocate General (Criminal Law) stated that implementation of any expanded subpoena authority would be best initiated through a review by the Joint Services Committee.³ See the Finding section of the report for a discussion of the management comments and the Management Comments section for a complete text of the comments.

³ DoD Directive (DoDD) 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 8, 1996, formalizes the JSC and defines the roles, responsibilities and procedures for any changes to the Manual for Courts-Martial and the Uniform Code of Military Justice.

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Background

This evaluation was performed to address two matters. The first was a recommendation made by the National Academy of Public Administration⁴ (NAPA) in a June 1999 report entitled, *Adapting Military Sex Crime Investigations to Changing Times*. Chapter 2 of the NAPA report addresses “Investigative Authorities and Autonomy.” The report notes that the Military Criminal Investigative Organizations (MCIOs) lack direct subpoena authority and that there is a growing potential for use of subpoenas in investigations involving Internet computer crime (including pornography and child solicitation). The NAPA panel recommended that DoD consider providing approval authority to the Services’ General Counsels or to some other appropriate Service official. Second, an April 19, 1999, Air Force Office of Special Investigations memorandum to the Inspector General, DoD, recommended the establishment of subpoena authority for criminal investigations as an issue for the IG, DoD, Office of Criminal Investigative Policy and Oversight (CIPO) FY 2000 Project Plan.

Inspector General Subpoena Authority. The authority of the IG, DoD, to issue subpoenas is derived from the Inspector General Act of 1978, as amended, 5 U.S.C. app 3. The Act provides each statutory Inspector General broad duties and responsibilities. Pursuant to 5 U.S.C. app 3, § 2 (1), Inspectors General are empowered to conduct and supervise audits and investigations relating to the “programs and operations” of his or her agency. To properly perform these functions, Inspectors General are given subpoena authority to compel the production of documentary evidence. The Office of Criminal Investigative Policy and Oversight administers the OIG subpoena program for the MCIOs on behalf of the Inspector General.⁵ During FYs 1997, 1998, and 1999, CIPO received requests for 634 subpoenas involving 244 MCIO investigations. The overwhelming majority of these MCIO subpoena requests (95 percent) supported fraud investigations.

Objectives

Our primary objective was to evaluate whether the Services’ limited authority to issue subpoenas adversely impacts their ability to conduct general crimes investigations. The evaluation focused on the effectiveness of the authorities and mechanisms available to (and used by) the MCIOs to obtain all types of evidentiary material during investigations. We also explored whether the

⁴The National Academy of Public Administration is an independent, nonpartisan, nonprofit organization comprised of former legislators, jurists, Federal and State executives and scholars that has been contracted to assist Government and private agencies and organizations in research and problemsolving. NAPA was granted a congressional charter in 1984.

⁵While CIPO’s principal mission is to develop policy for and to monitor and evaluate the performance of the DoD law enforcement community, CIPO also administers and manages the subpoena program for the MCIOs.

subpoena authority within the Office of the Inspector General was adequate to support MCIO general crimes investigations. Appendix A discusses the evaluation scope and methodology.

Sufficiency of the Military Services Subpoena Authority

Investigators in the Military Criminal Investigative Organizations (MCIOs) conducting general crimes investigations sometimes experience situations in which no mechanism is available to compel the production of evidence. This condition exists because of the Services' limited authority to issue subpoenas when investigating general crimes. Consequently, some investigations are incomplete, and some prosecutions may be precluded.

Background

MCIO criminal investigators must often collect physical evidence in support of their investigations of violations of the Uniform Code of Military Justice (UCMJ). The UCMJ is the statutory body establishing the military justice system (essentially criminal law) and is set out in Title 10 of the United States Code. The UCMJ is applicable at all times to all service members worldwide. In addition to and in concert with the UCMJ, the Manual for Courts-Martial (MCM)⁶ establishes the rules for courts-martial and the military rules of evidence; sets out the substance of the punitive articles including the maximum punishments; and prescribes the procedures for nonjudicial punishment. Neither the UCMJ nor the MCM provides authority to issue subpoenas to obtain evidence prior to "referral of charges"⁷ except in the case of a court of inquiry or deposition.

UCMJ Process. In the military, any person subject to the UCMJ may "prefer" or bring charges against another service member.⁸ Prior to preferring charges against another service member, the complainant must have personal knowledge of the misconduct or must have investigated it. After preferral of charges and the conduct of post-preferral investigations if required (see e.g., Article 32, UCMJ), the appropriate court-martial convening authority may "refer" the charges to a specified level of court-martial. The referral assigns the case to a

⁶ The Manual for Courts-Martial is promulgated under the President's authority as commander-in-chief and as provided for in Article 36, UCMJ (10 U.S.C. §836).

⁷ Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral of charges requires three elements: (1) a convening authority who is authorized to convene the court-martial and is not disqualified (see R.C.M. 601(b) and (c)); (2) preferred charges which have been received by the convening authority for disposition (see R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and (3) a court-martial convened by that convening authority or a predecessor (see R.C.M. 504).

⁸ A service member who prefers charges must: (1) sign the charges and specifications under oath before a commissioned officer of the Armed Forces authorized to administer oaths; and (2) state that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

specific court-martial convening order that designates the members of the court martial. The Military Judge, Trial Counsel, Trial Defense Counsel, and Court Members (the military equivalent of a civilian jury) are detailed to the court-martial in accordance with service regulations.

Trial Subpoena. Article 46 of the UCMJ provides that, “The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.” Rule 703(e)(2)(C), MCM, authorizes a summary court-martial or the trial counsel of a special or general court-martial to issue subpoenas to obtain civilian witnesses. A trial subpoena may also be used to command the person to whom it is directed to produce books, papers, documents or other objects designated therein (Rule 703(e)(2)(B)). However, subpoenas provided for by Rule 703 may not be used to compel a witness to appear at an examination or interview before a trial.⁹ Therefore, because trial subpoenas may only be issued by the summary court-martial or the trial counsel of a special or general court-martial, that is after the referral of charges, they are not available to investigators during the principal and formative part of their investigations.

DoD Inspector General Subpoena Authority. Pursuant to the Inspector General Act of 1978, 5 U.S.C. app. 3, section 6(a)(4), Inspectors General covered by the statute are authorized “to require by subpoena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act....” In terms of scope, an IG subpoena can compel production of documentary evidence such as books, records or other documents. However, these Inspector General subpoenas cannot be used to compel production of physical evidence that is non-documentary in nature (such as a murder weapon), nor can these subpoenas compel testimony.

Pursuant to Section 4 of the Inspector General Act, the DoD Inspector General has the authority to conduct audits and investigations relating to the “programs and operations” of the DoD, and to prevent and detect potential waste, fraud and abuse within the Department. When attempting to determine whether a matter is within the authority of the Inspector General, it must be determined whether the Department has suffered a loss, or if it has been the victim of fraud, waste, or abuse relating to a “program or operation of the Department,” or whether the matter is within the interest of the Inspector General. If that is the case, the Inspector General may issue a subpoena. The Inspector General does not usually issue subpoenas in general crimes investigations unless the Department is the victim.

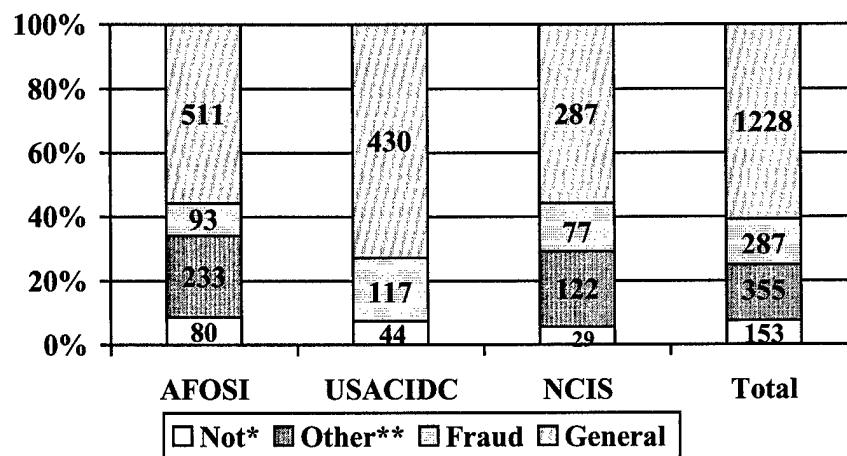
Within these limitations it is clear that the IG subpoena authority is of little use to most investigations of general crimes specified in the UCMJ.

⁹ They may, however, be used to obtain witnesses for a deposition or a court of inquiry.

Survey to Support Subpoena Sufficiency

DoD Inspector General Survey Questionnaire. Based on the results of a survey we conducted, coupled with the subpoena limitations discussed above, we concluded that the subpoena authority within DoD in support of general crimes investigations, for offenses punishable under the UCMJ, is inadequate. We surveyed special agents of the MCIOs using a questionnaire posted on the World Wide Web. Overall, 70 percent of the MCIO special agent population responded to this survey.¹⁰ Responses from the MCIOs were as follows: U.S. Army Criminal Investigation Command (USACIDC) 75 percent; Naval Criminal Investigative Service (NCIS) 60 percent; and Air Force Office of Special Investigations (AFOSI) 73 percent. Investigative experience levels of the responding agents were as follows: less than 1 year, 10 percent; more than 1 but less than 3 years, 17 percent; more than 3 but less than 5 years, 11 percent; more than 5 but less than 7 years, 9 percent; and 7 years or more, 52 percent. Agents were asked to identify the largest single category of investigations they conducted during the 3 years immediately preceding the survey. A total of 61 percent of the respondents indicated general crimes investigations as their largest single category of investigation. Figure 1 shows the breakdown of the responses from the MCIOs on category of investigation conducted during the past 3 years.

Figure 1. Largest Category of Investigation Worked for Past 3 Years



* Not involved in conducting investigations

** Other (counterintelligence/counterespionage)

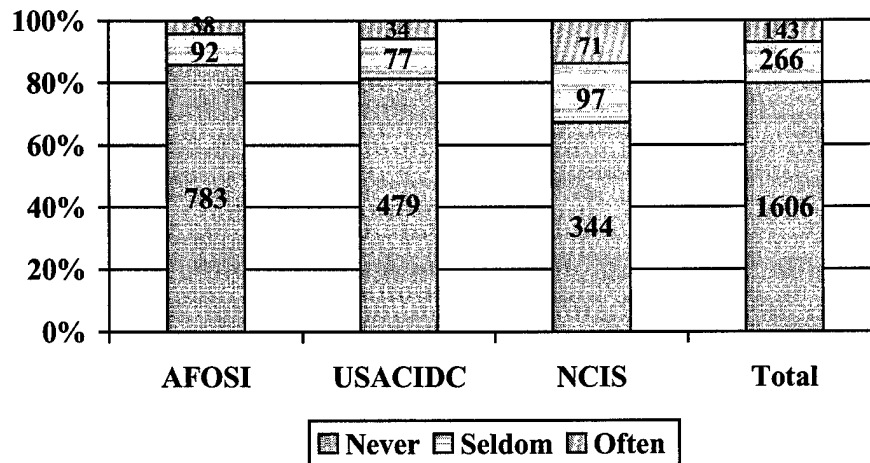
Mechanisms Used to Support General Crimes Investigations

Adequacy of Existing Mechanisms Used to Compel Evidence. According to survey results, MCIO agents experience instances where no adequate mechanism is available to compel the production of evidence needed to complete their

¹⁰This survey targeted 2,906 special agents.

investigations. In the context of general crimes cases, we asked agents to rate the effectiveness¹¹ of the following mechanisms to compel evidence: (1) Grand Jury Subpoena; (2) Military Search Authorization; (3) Federal Subpoena Duces Tecum; (4) Military Trial Subpoena; and (5) DoD Inspector General Subpoena. We also asked agents to list any other mechanisms used and to rate the effectiveness of these mechanisms. Agents rated the “military search authorization,” “search warrants” (local, state, federal), and “consent” as the most frequently used and most highly effective mechanisms in supporting general crimes investigations. We also asked agents, “Have you personally conducted a general crimes investigation for an offense punishable under the UCMJ, where you needed to obtain evidence to support your investigation, but felt you could not use any mechanism to compel the production thereof?” The response choices available were “often,” “seldom,” and “never.” Of the 2,023 agents who responded, 409 (20 percent) indicated that they “often” or “seldom” encountered instances where they felt unable to use any mechanism to compel the production of evidence. Figure 2 shows a breakout by MCIO of agents reporting the lack of a mechanism to compel production of evidence.

Figure 2. Agent Responses to a Lack of a Mechanisms to Compel Production of Evidence



In addition, agents identified: (1) the types of case investigated, (2) evidence desired, and (3) why they felt they could not use some type of mechanism to compel the production of the evidence they desired. Of the responses, 341 agents provided detailed followup responses, of which 260 answers met the aforementioned parameters. The agents listed larceny, drugs, homicide or unattended death, and child maltreatment/mistreatment investigations as the predominant case types in which they needed to obtain evidence but in which they lacked a mechanism for doing so. Types of evidence included bank, telephone, financial, and medical records. Contributing factors provided by the agents

¹¹For purposes of this evaluation, effectiveness was defined as: use of the mechanism resulted in obtaining the evidence/information desired, without unreasonable delays, complications, or limits placed on use of the evidence/information obtained. Agents rated mechanisms as highly effective, effective, somewhat effective or not effective.

included: no subpoena authority; DoD Inspector General subpoena unavailable, unwarranted, or too difficult to obtain; jurisdictional constraints, i.e., local law enforcement and judicial authorities declined to assist MCIO investigators since the crime was military in nature; lack of U.S. Attorney interest due to dollar threshold; and exclusive federal jurisdiction precluded use of state subpoena.

Adequacy of DoD Inspector General Subpoena. MCIO investigators use DoD Inspector General subpoenas to obtain records primarily in fraud cases. Our survey revealed that 460 of the 2,023 respondents (23 percent) have requested DoD Inspector General subpoenas. Subpoenas requested consisted of 313 (69 percent) for fraud cases, 65 (14 percent) for general crimes investigations, and 77 (17 percent) for investigations which involved both fraud and general crimes offenses. As discussed previously, the DoD Inspector General does not generally grant requests for IG subpoenas to support general crimes investigations that do not meet specific criteria, and the type of evidence that IG subpoenas can obtain is also limited.

Judge Advocate General's Corps Perspective

Judge Advocate General's Corps Survey. Because MCIO agents identified a potential gap in suitable mechanisms to obtain physical evidence, particularly in adequate subpoena authority, and the potential significance to outcomes of their investigations, we believed it would be beneficial to obtain the perspective of the Services' Judge Advocate General's Corps (JAGC) members. Specifically, we targeted judge advocates (JAs) with current or prior military justice experience. We wanted to determine the extent, if any, in which limited subpoena authority affected their ability to successfully prosecute cases.

We requested and received support from the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant, U.S. Marine Corps, to conduct a survey. During September 2000, we posted a survey questionnaire on the World Wide Web addressed to JAs with military justice experience either as Trial Counsel (including Senior Trial Counsel, Chief of Military Justice, or equivalent positions), Military Judge, Staff Judge Advocate (SJA), or Deputy SJA. Services-wide, 753 JAGC personnel participated in the survey.¹² Of the total, 239 respondents had more than 7 years of military justice experience; 105 had more than 5 but less than 7 years; 142 had more than 3 but less than 5, and 181 had more than 1 but less than 3 years experience. Further, 83 respondents indicated having less than 1 year of military justice experience (3 respondents did not provide a response to level of military justice experience).

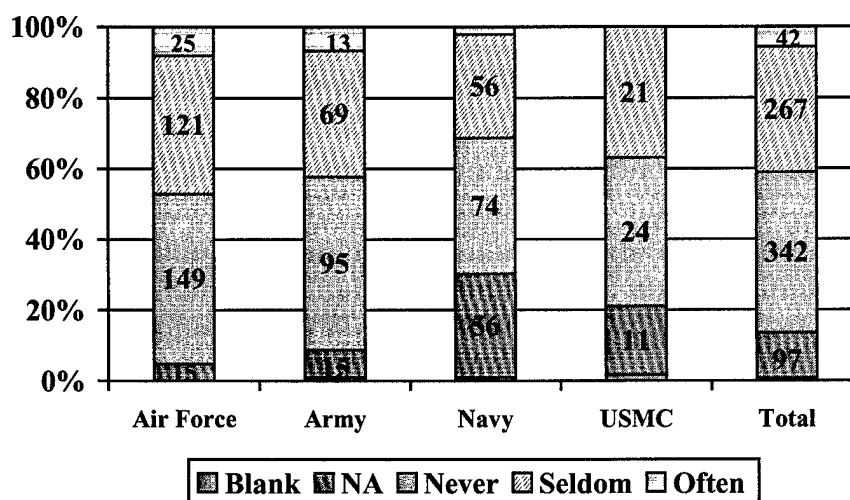
Results of JAGC Survey. The results of the survey support the finding that in some instances investigators lack a mechanism to compel the production of evidence when investigating offenses punishable under the UCMJ. Of the 753 survey respondents, 500 (66 percent) answered "yes" when asked, "As a Trial Counsel, have you ever needed evidence prior to referral of charges to support an investigation of a crime cognizable under the UCMJ, but concluded no mechanism was available to compel its production?" Further, of the 500 respondents who answered "yes," 408 felt that the ability to issue or obtain a

¹² Although 753 is not representative of the approximately 3,940 JAGC population, the data provided clearly assisted us in supporting the finding and also provided examples to validate our MCIO survey.

military trial subpoena prior to referral of charges would have benefited their case or resulted in a referral of charges.

In addition, when asked if they had ever been involved with a general crimes investigation cognizable under the UCMJ where they could not successfully prosecute the case because they could not compel the production of certain evidence, 309 (41 percent) of the 753 respondents answered “often” (42 respondents) or “seldom” (267 respondents). Of the total, 342 answered “never.” Of the remaining respondents, 97 selected “not applicable,” and five left the answer blank. Figure 3 shows the breakdown of responses where respondents felt they could not successfully prosecute a case because of the lack of a mechanism to compel evidence.

Figure 3. Respondents Involved in Investigations Not Prosecuted Due To Lack of a Mechanism to Compel Evidence



We also asked respondents, “As a Trial Counsel have you ever been involved with the investigation of a general crime prosecutable under the UCMJ, where prior to the referral of charges, you advised investigators to obtain evidence by requesting the intervention of appropriate local, state, or federal law enforcement or judicial authorities (e.g., using their own subpoenas)?” Our purpose in asking the question was to determine if obtaining assistance from the local law enforcement or judicial community is a feasible substitute for adequate subpoena authority within the Services. Of the total respondents, 131 answered “often,” and 278 selected “seldom.” The remaining respondents chose, “never,” “not applicable,” or left the answer blank. For respondents who answered “often,” or “seldom,” we asked if those authorities declined to assist. The responses included: Often, 67; Seldom, 149; and Never, 197. Detailed followup answers provided by those respondents who selected “often,” or “seldom,” cited priorities established by the local law enforcement community, i.e., manpower and resources, and jurisdictional constraints that precluded their support in investigating offenses involving service members.

Use of Rule 703 Trial Counsel Subpoena. Of the 753 respondents, 262 had never issued a Rule 703 trial subpoena. When asked “As a Trial Counsel, in how

many separate UCMJ prosecutions have you used a Rule 703 trial subpoena to compel the production of non-testimonial evidence, irrespective of the number of individual subpoenas?" the respondents identified 490 instances where they issued one or more subpoenas. The types of evidence and cases listed by the respondents were similar to those listed by the MCIO survey respondents. Records included bank records, business records, financial records, medical records, phone records, and Internet records. Types of cases included drugs, larceny, sexual assault/rape, child maltreatment or mistreatment, computer crimes, and murder/manslaughter. In addition, 696 of 753 respondents believed that the availability of military subpoena authority similar to that outlined in Rule 703, MCM, but available prior to referral of charges, would enhance the military justice system.

Our analysis of the JAGC survey also identified 44 of the 753 respondents were currently in trial defense counsel positions. Of that number, 37 believed subpoena authority similar to that outlined in Rule 703, MCM, should be available prior to referral of charges.

National Academy of Public Administration Finding on Subpoena Sufficiency within the DoD

Background. The NAPA report,¹³ *Adapting Military Sex Crime Investigations to Changing Times*, June 1999, notes that the MCIOs lack direct subpoena authority. NAPA reported that there is a growing potential for the productive use of subpoenas in investigations of Internet computer crime, including pornography and child solicitation. The panel felt that subpoena authority would be useful for MCIOs in their investigations and recommended that DoD consider providing approval authority to the Services' General Counsels or another appropriate Service official. On January 24, 2000, the Deputy Secretary of Defense issued a memorandum to the Inspector General, Department of Defense, requesting, among other taskings, that the Inspector General evaluate this issue.

Delegation of Inspector General Subpoena Authority. The Inspector General Act of 1978 authorizes the Inspector General "to require by subpoena [sic] the production of all information . . . necessary in the performance of functions assigned by this Act." There is no provision in the Act that states that this subpoena authority may be delegated outside the Office of the Inspector General or used for purposes outside the scope of the Act.

Determination of Subpoena Authority within the DoD. Our surveys of the MCIO investigations and the Services' JAs demonstrate the need for additional subpoena authority for investigations of UCMJ offenses. In our survey addressed to the Services' JAs, we asked, "If a new military investigative subpoena authority were added to the UCMJ, who should issue/approve the subpoena?" Of the 753 responses, 226 selected "Military Magistrate" and 202 selected "Trial Counsel." In our discussions with the Services' JAGC personnel and members of

¹³Section 1072 of the National Defense Authorization Act for Fiscal Year 1998 tasked NAPA to conduct a study of MCIO policies and procedures in sex crimes investigations. In May 1998, DoD contracted with NAPA, which studied a variety of investigative issues including subpoena sufficiency.

the Joint Service Committee (JSC) on Military Justice¹⁴ it was noted that it is DoD policy to review the Manual for Courts-Martial annually, and to propose any legislative amendments to the UCMJ. The JSC, under the direction of the General Counsel, DoD, is responsible for reviewing the Manual for Courts-Martial and proposing any legislative amendments to the UCMJ to the General Counsel, DoD. Although NAPA recommended that DoD consider providing approval authority to the Services' General Counsels or another appropriate Service official, the proper managing of such an issue is the responsibility of the DoD General Counsel. DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon," May 21, 1964, designates the DoD General Counsel responsibility for all matters concerning or relating to legislation, Executive Orders, and Proclamations.

Summary

As part of the overall military judicial process, investigations are being conducted where there is a need to obtain evidence to support the elements of proof for violations of the UCMJ well prior to referral of charges. We believe our surveys of the MCIO investigators and the Services' JAs are consistent in identifying the need for additional subpoena authority within the military judicial process. Subpoena availability in military cases arises from two sources, each of which has significant limitations: trial subpoenas and Inspector General, DoD, subpoenas. Trial subpoenas are not available to investigators during the main portion of their investigation and are therefore of essentially no benefit to criminal investigators. Although the DoD Inspector General subpoena is effectively used for fraud investigations, its use in general crimes investigations is extremely limited. That being the case, criminal investigators are often left with no means for compelling the production of evidence before a suspect is referred for court-martial.

Recommendation and Management Comments

We recommend that the General Counsel, DoD, under the authority of DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamation, and Reports and Comments Thereon," May 21, 1964, initiate or direct action to establish additional subpoena authority within the military justice system as supported by this evaluation.

DoD General Counsel Comments. The DoD General Counsel concurred in the recommendation stating that any expanded subpoena powers should first be formally reviewed by the Joint Service Committee on Military Justice (JSC), pursuant to DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 8, 1996.

Army Comments. The Army Office of The Judge Advocate General concurred in both the finding and the recommendation. The Army recommended a slight

¹⁴The JSC on Military Justice consists of representatives of the Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Chief Counsel, United States Coast Guard.

revision on page 3, in the last sentence of the introductory "Background." The sentence read that "Neither the UCMJ nor the MCM provides authority to issue subpoenas to obtain evidence prior to "referral of charges." The Army pointed out that R.C.M. 703(e)(2)(C) authorizes the president of a court of inquiry or an officer detailed to take a deposition to secure witnesses or evidence by subpoena. Both courts of inquiry and depositions may take place prior to referral. As such, the Army recommended we amend the sentence to read, "Neither the UCMJ nor the MCM provides authority to issue subpoenas to obtain evidence prior to "referral of charges" except in the case of a court of inquiry or deposition." Comments were also received from the U.S. Army Criminal Investigation Command who offered no objections to the report as written.

Navy Comments. The Navy Office of The Judge Advocate General concurred with the recommendation commenting that the General Counsel initiate action pursuant to DoD Directive 5500.17 to establish additional subpoena authority. The Naval Criminal Investigative Service also commented and concurred with the recommendation. NCIS stated that extending subpoena authority vice creating trial counsel or military magistrate subpoena authority for general criminal investigations is more prudent since the IG, DoD, currently provides administrative subpoenas in fraud cases. This extension would be a logical consolidation that would enable the continuation of one central clearing location of records and statistics and of one DoD entity that consistently applies the law. The Staff Judge Advocate to the Commandant of the Marine Corps also commented and concurred with the finding and recommendation. The Marine Corps provided two comments. The first reiterated the Army TJAG suggestion for revision to the last sentence of the "Background" paragraph. The second comment recommended we correct the last sentence on page 3 under "UCMJ Process." The Marine Corps point out that "referral" is itself the act that sends charges before a previously convened court-martial, and no subsequent assignment of charges occurs. The convening order designates only the members of the court-martial; it does not designate the Military Judge, the Defense Counsel, or the Trial Counsel.

Air Force Comments. The Air Force Judge Advocate General concurred in the stated findings and conclusions of the evaluation report. The Judge Advocate General stated that implementation of expanded subpoena authority is best left to the Joint Service Committee on Military Justice. The Air Force Office of Inspector General also commented and concurred with the report's finding and recommendation.

Evaluation Response. We consider management comments to be fully responsive and have incorporated suggested changes by the Army and Marine Corps for clarification purposes.

Appendix A. Evaluation Process

Scope and Methodology

Work Performed. We performed this evaluation from January through September 2000. The review focused on the sufficiency of subpoena authority within DoD in support of general crimes investigations of offenses cognizable under the UCMJ. We conducted interviews and held discussions with program managers and staff members at the headquarters of the MCIOs, the Services' Offices of The Judge Advocates General, and the Staff Judge Advocate to the Commandant, U.S. Marine Corps. To accomplish our objectives, we conducted two surveys. We addressed the first survey to all agents of the MCIOs. We wanted to determine the mechanisms used by the MCIOs to obtain documents or other evidentiary material during general crimes investigations, their effectiveness, and their experience with subpoenas that did or would have substantially contributed to the successful completion of an investigation. We also used the survey questionnaire to identify any policy or procedural deficiencies in using or obtaining a DoD Inspector General subpoena in support of general crimes investigations. We determined, based upon our review and analysis of the agents' responses, that a significant number of respondents perceive the existence of a lack of an effective mechanism to obtain evidence prior to charges being referred. As a result of this survey, we developed a second survey addressed to the Services' Judge Advocate General's Corps members with prosecution experience to obtain their perspective on the issue. Finally, we requested a policy clarification from the DoD Deputy General Counsel, Inspector General, on the issuance of DoD Inspector General subpoenas in support of general crimes investigations.

Limitations to Evaluation Scope. The evaluation was limited to assessing the sufficiency of subpoena authority within DoD in support of general crimes investigations of offenses cognizable under the Uniform Code of Military Justice.

Contacts During the Evaluation. We visited or contacted individuals and organizations within the DoD. Further details are available on request.

Prior Coverage

National Academy of Public Administration Report, *Adapting Military Sex Crime Investigations to Changing Times*, June 1999

Appendix B. Report Distribution

Office of the Secretary of Defense

Under Secretary of Defense for Personnel and Readiness
General Counsel, Department of Defense
Deputy General Counsel (Inspector General)
Director, Defense Criminal Investigative Service

Department of the Army

Assistant Secretary of the Army (Financial Management and Comptroller)
General Counsel, Department of the Army
Inspector General, Department of the Army
Auditor General, Department of the Army
Deputy Chief of Staff for Operations and Plans
Judge Advocate General, Department of the Army
Commander, U.S. Army Criminal Investigation Command

Department of the Navy

General Counsel, Department of the Navy
Director, Naval Criminal Investigative Service
Inspector General, Department of the Navy
Judge Advocate General, Department of the Navy
Staff Judge Advocate to the Commandant, Headquarters, U.S. Marine Corps

Department of the Air Force

Assistant Secretary of the Air Force (Financial Management and Comptroller)
General Counsel, Department of the Air Force
Inspector General, Department of the Air Force
Judge Advocate General, Department of the Air Force
Commander, Air Force Legal Services Agency
Commander, Air Force Office of Special Investigations

Other Defense Organizations

Director, National Security Agency
Inspector General, National Security Agency
Inspector General, Defense Intelligence Agency

Congressional Committees and Subcommittees, Chairman and Ranking Minority Member

Senate Committee on Appropriations
Senate Subcommittee on Defense, Committee on Appropriations
Senate Committee on Armed Services
Senate Committee on Governmental Affairs
House Committee on Appropriations
House Subcommittee on Defense, Committee on Appropriations
House Committee on Armed Services
House Committee on Government Reform
House Subcommittee on Government Management, Information, and Technology,
Committee on Government Reform
House Subcommittee on National Security, Veterans Affairs, and International Relations,
Committee on Government Reform



GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

MAR 01 2001

GENERAL COUNSEL

MEMORANDUM FOR DEPUTY ASSISTANT INSPECTOR GENERAL
(CRIMINAL INVESTIGATIVE POLICY AND OVERSIGHT)

SUBJECT: Review of Draft Evaluation Report on the Sufficiency of Subpoena Authority within
the Department of Defense in Support of General Crimes Investigations
(Project No. 9950010J, February 16, 2001)

The above-captioned draft report has been reviewed and I concur in the proposed recommendation, but offer the following additional considerations. The proposed recommendation calls upon this office to initiate action in support of legislation, pursuant to DoD Directive 5500.1, "Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon" (May 21, 1964). While legislation may be required, actions affecting the military justice system should first be formally reviewed by the Joint Service Committee on Military Justice (JSC), pursuant to DoD Directive 5500.17, "Role and responsibilities of the Joint Service Committee (JSC) on Military Justice" (May 8, 1996).

As noted in footnote 13 of your draft evaluation report, the JSC conducts an annual review of the Manual for Courts-Martial and provides this office with any proposed legislative changes affecting the Uniform Code of Military Justice. The JSC annually reviews the procedures governing pretrial, trial, and post-trial matters in the military justice system. Any recommendation in the final evaluation report calling for expanded subpoena powers would first be referred for JSC formal consideration before legislation or an Executive Order is proposed.

In addition, provisions of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (codified at 10 U.S.C. §§ 4027, 7480, and 9027 (October 30, 2000)) and the Military Extraterritorial Jurisdiction Act of 2000 (Public Law 106-523 (November 22, 2000) (codified at 18 U.S.C. § 3261, *et seq.*)) have statutorily provided for potentially increased roles by MCIO Special Agents in the investigation of general crimes -- on and off the military installation, within the United States and overseas. However, not all of these potential investigations will result in prosecutions within the military's jurisdiction. In fact, U.S. District Courts will have jurisdiction over all overseas investigations involving crimes under the Military Extraterritorial Jurisdiction Act of 2000.

The Department of Defense, in conjunction with the Departments of Justice and State, is currently examining the proper authority and scope of these new law enforcement functions and is developing applicable guidelines. As such, any legislative or policy initiative to expand subpoena powers resulting from your evaluation report should consider these recent statutes.



Daniel J. Dell'Orto
Acting



Department of Army Comments



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

REPLY TO
ATTENTION OF:

DAJA-CL


24 April 2001

MEMORANDUM FOR Deputy Inspector General, Department of Defense (Criminal Investigative Policy and Oversight, 400 Army Navy Drive, Arlington, Virginia 22202

SUBJECT: Review of Draft Evaluation Report on the Sufficiency of Subpoena Authority within the Department of Defense in Support of General Crimes Investigations (Project No. 9950010J)

1. The Criminal Law Division of the Office of the Army Judge Advocate General reviewed the draft evaluation. We concur that Military Criminal Investigative Organizations lack effective mechanisms for compelling production of evidence in general crimes investigations. We also concur with the recommendation that the General Counsel, Department of Defense, initiate or direct action to accomplish additional subpoena authority within the military justice system.
2. Recommend a slight revision to the last sentence of the introductory "Background" paragraph on page 3. This sentence currently states that "Neither the UCMJ nor the MCM provides authority to issue subpoenas to obtain evidence prior to "referral of charges". R.C.M. 703(e)(2) (C) authorizes the president of a court of inquiry or an officer detailed to take a deposition to secure witnesses or evidence by subpoena. Both courts of inquiry and depositions may take place prior to referral. Suggest the sentence be amended to read, "Neither the UCMJ nor the MCM provides authority to issue subpoenas to obtain evidence prior to "referral of charges" except in the case of a court of inquiry or deposition."
3. LTC Denise Lind is the POC for this action at (703) 588-6744 or denise.lind@hqda.army.mil.

FOR THE JUDGE ADVOCATE GENERAL:


DANIEL F. MCCALLUM
COL, JA
Chief, Criminal Law Division



DEPARTMENT OF THE ARMY
U. S. ARMY CRIMINAL INVESTIGATION COMMAND
6010 6TH STREET
FORT BELVOIR, VIRGINIA 22060-5606

CIOP-COP-PO (195-1)

15 March 2001

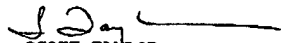
MEMORANDUM FOR Inspector General, Department of Defense, 400 Army
Navy Drive, Arlington, VA 22202

Subject: Evaluation Report on the Sufficiency of Subpoena
Authority within the Department of Defense in Support of General
Crimes Investigations (Project No. 9950010J)

1. Your evaluation report, SAB, was reviewed by our policy
branch and staff judge advocate. There are no objections to the
report as written.

2. Point of contact for this memorandum is CW4 Ray Montano,
Policy Branch, (policy project 089-99) at 703.806.0222 or email
montanor@belvoir.army.mil

FOR THE COMMANDER


SCOTT TAYLOR
Colonel, GS
Deputy Chief of Staff
for Operations

Department of Navy Comments



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO

10 April 2001

MEMORANDUM FOR INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE

SUBJECT: EVALUATION REPORT ON THE SUFFICIENCY OF SUBPOENA
AUTHORITY WITHIN THE DOD IN SUPPORT OF GENERAL CRIMES
INVESTIGATIONS (PROJECT NO. 9950010J)

After a thorough review of Subject Evaluation Report, the Judge Advocate General of the Navy concurs with the recommendation, contained in the Draft Evaluation Report, that the General Counsel initiate action pursuant to DoD Directive 5500.17 to establish additional subpoena authority.

A handwritten signature in dark ink, appearing to read "K. R. Bryant".

K.R. Bryant
Captain, Judge Advocate General's Corps
United States Navy
Deputy Assistant Judge Advocate General
(Criminal Law)



DEPARTMENT OF THE NAVY

HEADQUARTERS
NAVAL CRIMINAL INVESTIGATIVE SERVICE
WASHINGTON NAVY YARD BLDG 111
716 SICARD STREET SE SUITE 2000
WASHINGTON DC 20388-5380

00G/01-0088
18 April 2001

MEMORANDUM FOR THE ACTING DEPARTMENT OF DEFENSE INSPECTOR
GENERAL

FROM: Director, Naval Criminal Investigative Service
Prepared by: N. F. Kiger, NCIS Counsel, (202) 433-9617

SUBJECT: Evaluation Report on the Sufficiency of Subpoena Authority Within the DOD in
Support of General Crimes Investigation (Project No. 9950010J)

PURPOSE: To provide comments on the findings and recommendations from the subject named
report

DISCUSSION: NCIS concurs with the findings that: 1) criminal investigations are being conducted where there is a need to obtain evidence to support the elements of proof of UCMJ violations well prior to the referral of charges; 2) since trial subpoenas are not available to investigators during the main portion of the investigation, they serve essentially no benefit to criminal investigators; and 3) since IG, DoD subpoenas are limited to those cases where the Department has suffered a loss or has been a victim of a fraud, waste or abuse, these subpoenas have very limited use in general crimes investigations. NCIS concurs with the recommendation that the DoD General Counsel initiate or direct actions to establish additional subpoena authority within the military justice system.

RECOMMENDATION: DoD General Counsel seek legislation to extend the IG, DoD subpoena authority to include general criminal investigations. Extending subpoena authority vice creating trial counsel or military magistrate subpoena authority for general criminal investigations is more prudent since the IG, DoD currently provides administrative subpoenas in fraud cases. This extension would be a logical consolidation that would enable the continuation of one central clearing location of records and statistics and of one DoD entity that consistently applies the law.

A handwritten signature in dark ink, appearing to read "Gregory A. Stovel".
Gregory A. Stovel
By direction

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1070

JAM2

30 APR 2001

SJA to CMC Comment on IG, DoD Project No. 9950010J, Draft
Evaluation Report dtd 16 Feb 01

Subj: DRAFT EVALUATION REPORT ON THE SUFFICIENCY OF SUBPOENA
AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT
OF GENERAL CRIMES INVESTIGATIONS (PROJECT NO.
9950010J)

1. Issue. We are asked to comment on the subject draft report.

2. Comment. We concur with the substantive findings and
recommendations. We recommend two technical corrections to the
text of the report.

a. The final sentence of the first paragraph of the
"Background" section at page 3 states that neither the Manual
for Courts-Martial (MCM) nor the Uniform Code of Military
Justice (UCMJ) authorize issuance of subpoenas before referral
of charges. This is not correct. Rule for Courts-Martial
(R.C.M.) 702(a) provides for the ordering of depositions at any
time after preferral of charges, and R.C.M. 702(f)(2) authorizes
the deposition officer to arrange for the production of
witnesses and evidence as provided for under R.C.M. 703(e).
R.C.M. 703(e)(2), in turn, authorizes issuance of subpoenas.
Accordingly, we recommend either that the word "preferral" be
substituted for the word "referral," or that a footnote be
appended to the word "referral" noting the limited availability
of a pre-referral deposition subpoena.

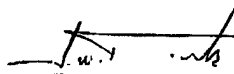
b. The final sentence of the subparagraph entitled, "UCMJ
Process," at page 4, states that after referral, charges "are
assigned to a specific court martial convening order which also
designates the members of the court-martial, including the
Military Judge, Trial Counsel, Trial Defense Counsel, and Court
Members" This is incorrect in two respects. First,
"referral" is itself the act that sends charges before a
previously convened court-martial, and no subsequent assignment
of charges occurs. Second, the convening order designates only
the members of the court-martial, it does not designate the
military judge, the defense counsel, or the trial counsel.
Accordingly, we recommend the last sentence be clarified to note
that after preferral, and completion of the Article 32

Department of Navy Comments

Subj: DRAFT EVALUATION REPORT ON THE SUFFICIENCY OF SUBPOENA
AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT
OF GENERAL CRIMES INVESTIGATIONS (PROJECT NO.
9950010J)

investigation where one is required, the convening authority may refer the charges for trial before a court-martial that he or she convened for the purpose of hearing the specific case, or for hearing cases generally. This portion of the report might also mention that, upon referral, power over a case passes to an independent trial judiciary.

3. Recommendation. That the final report reflect the foregoing comments.


H. W. FRANK
By direction

Department of Air Force Comments



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, UNITED STATES AIR FORCE
WASHINGTON, DC

23 MAR 2001

**MEMORANDUM FOR DEPUTY ASSISTANT INSPECTOR GENERAL, DoD,
CRIMINAL INVESTIGATIVE POLICY AND OVERSIGHT**

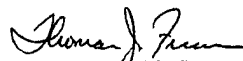
FROM: HQ USAF/JA
1420 Air Force Pentagon
Washington, DC 20330-1420

SUBJECT: Evaluation Report on the Sufficiency of Subpoena Authority within the DoD
in Support of General Crimes Investigations

This responds to your 16 February 2001 memorandum requesting our comments to subject report. The report concludes that military criminal investigative organizations lack fully effective mechanisms for compelling production of evidence in general crimes investigations. This conclusion was validated through a survey of the Services' judge advocate prosecutors who agreed that the limitations associated with present subpoena authority often leave investigators and prosecutors with no effective means for compelling production of evidence before charges are referred to court-martial.

We concur in the stated findings and conclusions of the evaluation report. Further, we concur in the recommended course for corrective action that would have the DoD General Counsel initiate or direct action to establish additional subpoena authority within the military justice system. Implementation of expanded subpoena authority, we submit, is best left to the Joint Service Committee on Military Justice.

Thank you for the opportunity to comment on subject evaluation report. Our POC in this matter is Lt Col Chris Burne, 614-4075.


THOMAS J. FISCUS
Major General, USAF
The Judge Advocate General

cc: SAF/GC

Department of Air Force Comments



DEPARTMENT OF THE AIR FORCE
OFFICE OF THE INSPECTOR GENERAL
WASHINGTON DC



16 April 2001

MEMORANDUM FOR ASSISTANT INSPECTOR GENERAL FOR AUDITING
OFFICE OF THE INSPECTOR GENERAL
DEPARTMENT OF DEFENSE

FROM: SAF/IGX

SUBJECT: DoDIG Draft Evaluation Report: Sufficiency of Subpoena Authority within the
Department of Defense in Support of General Crimes Investigations (Project No.
9950010J)

1. This is in reply to your memorandum requesting the Assistant Secretary of the Air Force (Financial Management and Comptroller) to provide Air Force comments on subject report.
2. The Air Force concurs with the report's finding and recommendation, and strongly endorses the establishment of additional subpoena authority within the military judicial process as supported by this evaluation.
3. Please refer any questions to Major Janice Pegram at (703) 695-3726.


RONALD E. HARVEY, Colonel, USAF
Director of Investigations

cc:
SAF/FMPF
SAF/GCM

Evaluation Team Members

The Office of the Deputy Assistant Inspector General for Criminal Investigative Policy and Oversight, Office of the Assistant Inspector General for Investigations, DoD, prepared this report. Personnel of the Office of the Inspector General, DoD who contributed to the report are listed below.

Phyllis M. Brown

SA Scott Russell

John Auman